IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 16, 2008 Session

STATE OF TENNESSEE v. TONY EDWARD BIGOMS

Appeal from the Criminal Court for Hamilton County
No. 242283 Rebecca Stern, Judge

No. E2008-01007-CCA-R3-CD - Filed July 17, 2009

The Defendant, Tony Edward Bigoms, appeals from his conviction by a jury in the Criminal Court for Hamilton County for attempted aggravated sexual battery, a Class C felony. The trial court sentenced the Defendant to six years' incarceration as a Range II, multiple offender. On appeal, the Defendant contends that the evidence was insufficient to convict him, that the trial court committed plain error when it excluded evidence of a magistrate's finding of no probable cause for an arrest warrant to issue, and that the current sentencing practice for a judge to find enhancement factors beyond a reasonable doubt does not comport with State v. Gomez, 239 S.W.3d 733 (Tenn. 2007), and Cunningham v. California, 549 U.S. 270 (2007). We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

Robin Ruben Flores, Chattanooga, Tennessee, for the appellant, Tony Edward Bigoms.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; William H. Cox, III, District Attorney General; and Boyd M. Patterson, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant was charged with attempted aggravated rape. At trial, the victim testified that she was fifty-four years old and had been staying at the home of Dorothy Lawrence, the Defendant's aunt, due to her own financial troubles. She said she had undergone open-heart surgery and had suffered both a light stroke and breast cancer. She said she had stayed on and off with Ms. Lawrence for twenty-nine or thirty years. She stated that she was treated as a member of the family and that she had a child with the Defendant's brother. She said that she had always stayed in the bedroom with two twin beds and that the home had three bedrooms. She said a chair sat in the space between the two twin beds.

The victim testified that she had stayed with Ms. Lawrence for a week and then moved back into her son's home. She stated that Ms. Lawrence called to tell her that Ms. Lawrence was going out of town, that the Defendant was coming to the house, and that Ms. Lawrence did not want the Defendant to be unsupervised in her home. She said she offered to return to Ms. Lawrence's house for the duration of her trip. She said that she went back to Ms. Lawrence's home and that she had experienced no problems with the Defendant, whom she identified in court, during that time until the early morning hours on May 27, 2002. She said Ms. Lawrence returned home around 8:00 or 9:00 p.m. on May 26, 2002. She said that some other women had come to visit her in Ms. Lawrence's home and that the Defendant had helped Ms. Lawrence with her suitcase upon her return. She said that after they all spoke with each other, the women left, and that she and Ms. Lawrence went to their respective bedrooms. She said she woke up when she felt someone crawling over her and kissing her neck. She said the Defendant was the person who was engaging in this conduct. She said she told him to stop. She said they struggled over her pants with his pulling at her pants and her pulling them up. She said that when they heard Ms. Lawrence at her bedroom door, the Defendant would lean to listen and would stop kissing her and pulling at her clothes. She said that when Ms. Lawrence apparently returned to her bedroom, the Defendant removed a pocketknife from a location "between the seat," held it to her neck, and told her to perform oral sex on him. She stated that she was wearing a "portocath" in her chest at this time for her chemotherapy and that she was afraid he would cut her. She said the Defendant did not stop his conduct until Ms. Lawrence left her bedroom to go to the bathroom. She said she escaped the Defendant at this time and ran through the other rooms of the house, ending up in Ms. Lawrence's bedroom. She said that she wanted to use the telephone but that Ms. Lawrence saw her crying and asked her what had happened. She said she told Ms. Lawrence that the Defendant had tried to have sex with her by holding a knife to her throat and that she wanted to call the police. She said Ms. Lawrence told her not to call the police. She said she did not telephone the police that night but telephoned her son to pick her up.

The victim testified that after she told Ms. Lawrence about the incident, Ms. Lawrence went to a bedroom door, called the Defendant to her, and asked the Defendant why he engaged in this conduct when he knew the victim had been ill. She said she heard the Defendant say he did not know why he had done this. She said all this occurred around 1:00 a.m. on May 27, 2002. She said she did not call the police until approximately one week later after her adult children told her she was not acting like herself.

On cross-examination, the victim testified that she had reviewed her earlier testimony in this case. While she acknowledged that her stroke affected her short-term memory, she said her long-term memory was unaffected by her health problems. She acknowledged having been shot in the eye with an arrow at age five. She said her illnesses did not prevent her from remembering what the Defendant had done to her. She stated that although she testified at the preliminary hearing that she had tried to fight off the Defendant, she said this meant only that she had tried to get him off her. She said she told the Defendant to stop. She stated that she and the Defendant slept in the room with the two twin beds but that they did not share a bed. She said the Defendant had not been in the room when she went to bed.

The victim said she did not remember telling the investigating officer that she could not describe the knife. She denied saying the knife had been on the chair between the two beds. Rather, she said the Defendant reached down and removed a knife that had been between the chair and the bed. She said that the Defendant had been lying on top of her and that she felt the "sting" of the knife against her neck.

The victim testified that the officer incorrectly recorded her statements as being that the Defendant stopped the assault when someone entered the house. She said she thought she told the officer that Ms. Lawrence was turning a door knob and denied telling the officer that the Defendant stopped the assault when someone entered the house. She denied making allegations in the past that Ms. Lawrence's father had sexually assaulted her. She denied that Ms. Lawrence, the Defendant, or the Defendant's brother and father of her adult child ever told her that she was not welcome in that house. She denied that anyone told her to stay away from the Defendant's brother. She denied that her child's father had been staying at Ms. Lawrence's home. She stated that their relationship had ended. She also stated that the Defendant had not been living at Ms. Lawrence's before she arrived. She said Ms. Lawrence told her in their telephone conversation that the Defendant would be living there and that she asked her to stay there that weekend, even though she had been living with her children. She denied asking to stay at Ms. Lawrence's because her son had thrown her out. She also denied that Ms. Lawrence told her she did not believe her. She did not remember whether there had been any figurines either on the nightstand behind the chair between the two beds or on the chest at the foot of the bed where the television was.

When asked why she did not say in her preliminary hearing testimony that Ms. Lawrence had asked her to stay with the Defendant, the victim testified that she did not remember what she had said at the hearing. She said that she did not have the house keys but that the Defendant did. She also said that she remembered the Defendant pulled down both her pants and her bra.

The victim denied that Ms. Lawrence told her or the two women who came to see her at the house to leave. She stated she did not remember talking with Ms. Lawrence or the Defendant after the incident. She said there had been no conflicts with either person since an incident over twenty years ago involving her now-adult daughter, who had been three or four years old at the time. She did not remember any conflict resulting after she alleged Ms. Lawrence's father sexually assaulted her, which she also did not remember doing. She denied there had been a conflict after an attempt to reconcile with the Defendant's brother. She testified on redirect examination that she did not consent to the Defendant's acts. The State rested.

The defense called Dorothy Lawrence as a witness. Ms. Lawrence testified that the Defendant was her nephew and that he had been living with her at the time of the events in question. She stated that he had always lived there and that he lived there at the time of trial. She said the victim and her son Curtis had been a couple. She said that she was preparing to go out of town for a week when the victim called her to inquire who would take care of the house in Ms. Lawrence's absence. She said she told the victim that the Defendant would take care of the house. She said she

did not give the victim permission to be at her house during her trip. She stated that both she and the Defendant had keys to her home.

Ms. Lawrence testified that upon her return, a friend drove her home and brought her luggage into the house, where the Defendant carried it to Ms. Lawrence's room. She said she was astonished to see the victim and two other women in her home because she had not invited any of them to come to the house. She said she told the victim that she had not invited her to the house. She said that when the two women left, she sat in her chair, where the Defendant removed her shoes. She said that the Defendant later went to bed. She said she walked to her room, saw the Defendant fast asleep, and did not see the victim. She said that she took two pills to reduce the swelling in her feet and that consequently she was up several times that night to go to the bathroom, which was three feet away from her bedroom door. She said she saw the victim asleep in the left twin bed. She said she was surprised that the victim chose this room in which to sleep and said she had never given her instructions on where to sleep previously. She said, however, that men and women who were not married were not permitted to share a bedroom.

Ms. Lawrence testified that she could usually hear sounds coming from another room but that the walls were not thin. She testified regarding counsel's drawing of the bedroom with the twin beds that reflected the layout of the room. She said that the two beds were parallel to each other and that there was a chair between them. She said a chest was at the foot of the left bed and that a television was on top of the chest. She said that figurines had been placed around the television. She said figurines were also on the shelf above the nightstand behind the chair. She said the Defendant slept in the right bed.

She said that when she was in the bathroom, the victim burst into the bathroom wearing Ms. Lawrence's "shortie" pajamas. She said the victim told her that the Defendant had held a knife to her throat and "asked" to have sex. She said she saw no injuries on the victim's neck. She said that she told the victim that she did not believe her but that she did not act to prevent her from calling the police. She said the victim followed her into her bedroom and repeated her claims. She said she walked to the Defendant's bedroom, where she turned on the lights and woke him up. She said he was asleep in his normal way, with the covers pulled over his head. She said she did not see a knife and did not store one on the bedroom chair. She said that all the figurines were in their places and that the Defendant was wearing pajamas. She said she did not hear any sounds of struggling or rummaging that night. She said that no law enforcement officers came to her house regarding the victim's allegations and that no searches of her residence were performed regarding this incident. She said the only person who came to speak with her was the prosecutor in this case. She said the Defendant did not admit having done what the victim claimed. She said she had not spoken with the victim since the incident.

On cross-examination, Ms. Lawrence said the victim told her that the Defendant held a knife to her throat and "asked" to have sex with her. Ms. Lawrence denied that he was trying to have sex with the victim. She said the victim was not upset when she told her what she claimed had occurred. She said the victim looked at the mirror before telling her that the Defendant held a knife to her

throat and asked to have sex with her. She stated that the victim "just ran in there like she was scared" but that the victim did not look scared to her. She denied having told the prosecutor that the victim looked frantic and upset when she ran into the bathroom. When an audio recording of her statement was played, she acknowledged having said the victim was frantic and upset, but she stated the victim was lying. She denied the prosecutor's claim that she did not tell the truth when she said the victim did not look scared. She said that the incident occurred around 3:00 a.m. and that the victim called her son to pick her up. She said that when she asked the Defendant if he had done anything to the victim, he said "no" and went back to sleep. She denied stating that the conversation with the Defendant occurred in her bedroom.

On redirect examination, Ms. Lawrence testified that the police and the prosecutor came to her house one Sunday night at 10:00 p.m. when she made the statement that the victim was a "drama queen." She said the Defendant had been home and in bed at this time. She said the prosecutor asked her several times about the Defendant's reaction to her questioning him.

Although the Defendant was charged with attempted aggravated rape, the jury convicted the Defendant of attempted aggravated sexual battery. This appeal followed.

I. SUFFICIENCY OF THE EVIDENCE

The Defendant contends the evidence is legally insufficient to convict him of the attempted aggravated sexual battery. He asserts that the only evidence in the case was the victim's testimony, the credibility of which was at issue in view of her history with the Defendant's family. He says she is a "drama queen" who did not report the incident immediately and whose account of the event varied with the version provided by the Defendant's aunt. Essentially, the Defendant claims that the victim was not permitted to be in the house and fabricated the story to gain attention. The State replies that the elements of the offense were satisfied and that the trier of fact determines witness credibility. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984).

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). We do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Any questions about the credibility of the witnesses were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

As pertinent to this case, aggravated sexual battery is the "unlawful sexual contact with a victim by the defendant . . . accompanied by any of the following circumstances: . . . Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon." T.C.A § 39-13-504(a)(1) (2006). "Sexual contact" means "the intentional touching of the victim's, the defendant's,

or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501(6) (1997). "Intimate parts" can include the "primary genital area, groin, inner thigh, buttock, or breast of a human being." Id. at (2).

Code section 39-12-101 provides:

> "A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
>
> (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

T.C.A. § 39-12-101(a)(1)-(3) (2006).

We conclude the elements of attempted aggravated sexual battery have been satisfied in this case. In the light most favorable to the State, the evidence reflects that the victim awoke to find the Defendant on top of her, kissing her neck, and pulling at her pants and bra. The victim told him to stop and struggled against him to prevent him from pulling down her pants. The Defendant then obtained a knife, secreted nearby, held it to the victim's throat, and told her to perform oral sex on him. The victim testified that she felt the Defendant hold a knife at her throat but that she escaped the Defendant when he paused in his attack to listen to his aunt walking in the house. In view of its verdict, the jury resolved all conflicts in the testimony and accredited the testimony of the victim over that of the Defendant's aunt, who refuted every aspect of the State's proof, including her own recorded description of the victim's conduct after the event occurred. See State v. Sheffield, 676 S.W.2d at 547; State v. Cabbage, 571 S.W.2d at 835. We cannot reweigh this determination. See State v. Bland, 958 S.W.2d at 659. The Defendant is not entitled to relief.

II. EXCLUSION OF A POLICE REPORT

The Defendant contends it was plain error for the trial court to exclude a police report stating that a magistrate did not issue an arrest warrant based upon the victim's allegations. The Defendant claims that the report is relevant because the victim's credibility was at issue in the trial. The State responds that (1) the Defendant did not include the report in the appellate record, thereby precluding this court from evaluating the report's relevance to the victim's credibility, (2) the Defendant waived this issue by not presenting it in his motion for new trial, and (3) the Defendant has not demonstrated plain error occurred.

The Defendant did not include this report in the appellate record. On appeal, he had "a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)). "Where the record is incomplete and does not contain . . . portions of the record upon which the party relies, an appellate court is precluded from considering the issue." Id. at 560-61 (citing State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)). We must presume the trial court's determination was correct. See State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); State v. Roberts, 755 S.W.2d at 836. The Defendant is not entitled to relief.

By failing to include the report in the record, the Defendant has also not demonstrated plain error. The record does not "clearly establish what occurred in the trial court." State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000) (holding that all five plain error factors must be established before a court can find plain error exists and that "complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established").

III. SENTENCING

The transcript of the sentencing hearing reflects that the date of the offense was May 27, 2002, and that the Defendant opted to be sentenced under the pre-2005 sentencing laws. See T.C.A. § 40-35-114, Sentencing Comm'n Cmts. (stating that defendants sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, have the option to be sentenced under pre-2005 sentencing law or its successor). The trial court determined that the Defendant was a Range II, multiple offender after finding that he had previously been convicted of one Class C felony, two Class D felonies, and two misdemeanors. See T.C.A. § 40-35-106(a)(1) (2003). The trial court found that the following two enhancement factors applied:

> (2) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range [and]
>
> (5) A victim of the offense was particularly vulnerable because of age or physical or mental disability . . . .

T.C.A. § 40-35-114(2), (5) (2003). The trial court found as mitigating factors that the victim had been released into the community with no subsequent arrests, that the Defendant had not had contact with the victim since the offense, and that the Defendant had spent three years in custody before his trials on this and other charges. See T.C.A. § 40-35-113(13) (2003) ("Any other factor consistent with the purposes of this chapter."). The trial court stated that it did not give the mitigating factors weight that would counteract the two enhancement factors and imposed a sentence of eight years. The trial court stated it considered the proof at trial, the presentence report, the Defendant's objections to the report, and the testimony presented at the sentencing hearing. The trial court found that confinement was necessary to protect society by restraining a Defendant who has a long history of criminal conduct and that confinement was necessary to avoid depreciating the seriousness of the offense. T.C.A. § 40-35-103(1)(A)-(B) (2003). The trial court stated the Defendant's potential for rehabilitation was poor "based on the [presentence report] and the [other] reports and everything else we know" and imposed an eight-year sentence "to serve."

At the hearing on the motion for new trial, the Defendant presented the following issues: that the evidence was insufficient to convict, that the trial court improperly applied the Defendant's past criminal conduct for which he was acquitted, and that proof of enhancement factors did not comply with Tennessee and United States case law. In its written order, the trial court found that in view of State v. Gomez, 239 S.W.3d 733 (Tenn. 2007), it was plain error to impose an eight-year sentence on the basis of the two enhancement factors not found by the jury beyond a reasonable doubt. The trial court stated that the Defendant's prior convictions did not justify an enhanced sentence, and it resentenced the Defendant to six years' incarceration.

On appeal, the Defendant states that his sentencing concern has in large part been resolved by the trial court's resentencing of the Defendant. He then repeats his claim that it is problematic to know which enhancement factors a jury found, and he urges this court to craft a mechanism similar to an indictment count for the jury to determine which factors it finds applicable. He analogizes this to a second count in an indictment for driving under the influence (DUI) that alleges a prior conviction for DUI. The State responds that because the trial court did not apply any enhancement factors and sentenced the Defendant to the minimum sentence in the range, the Defendant is not entitled to relief.

The Defendant does not challenge the length or manner of service of the sentence, and he concedes his sentencing issues are moot. We will not address them, and we decline the Defendant's invitation to issue an advisory opinion. See State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 193 (Tenn. 2000) (noting that it is well-settled that courts should not give advisory opinions). The Defendant is not entitled to relief.

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, PRESIDING JUDGE